A

ONG SIEW HWA

v.

UMW TOYOTA MOTOR SDN BHD & ANOR

B

HIGH COURT MALAYA, TAIPING
AHMAD NASFY YASIN JC
[CIVIL TRIAL NO: 22-25-06-2011]
3 SEPTEMBER 2013

C ***HIRE PURCHASE:*** *Hire purchase agreement - Implied condition - Goods of acceptable quality - Purchase of car - Car was not of acceptable quality and unfit for purpose bought - Whether purchaser as consumer entitled to reject and return car - Whether purchaser had redress against 'supplier' who supplied goods - Whether protection afforded by Consumer*
D *Protection Act 1999 applies to goods under hire purchase - Consumer Protection Act 1999, ss. 3, 32, 47*

The plaintiff purchased a new Toyota Camry 2.0G car for RM151,706.45 from the first defendant ('D1'), paid D1 an initial
E sum of RM71,706.45 and took a hire-purchase loan for the balance sum of RM80,000 from the second defendant ('D2'). From the day he took possession of the car, the plaintiff found that there was an imbalance in the way the car moved; specifically, the car wobbled and the steering pulled to one side. Over the course
F of nine months thereafter the plaintiff sent the car on nine occasions to D1's various service centres for the problems to be rectified but despite all the measures taken by D1's personnel, the problems persisted. The plaintiff finally left the car at D1's service centre, and contending that it was not of acceptable quality and
G unfit for the purpose for which it was bought, filed the instant action for an order to terminate the contract of sale and to seek the return of the purchase price of the car and RM30,300 he had spent on car rentals. D1, in its defence, contended that once the hire-purchase agreement ('HPA') between the plaintiff and D2, in
H which D2 claimed ownership of the car, came into being, any contractual relationship that existed between D1 and the plaintiff came to an end. D2, on the other hand, contended that the plaintiff had affirmed and continued to honour the HPA without raising any allegation of mistake or misrepresentation in respect of
I the terms of the HPA and therefore he had not shown that he had any reasonable cause of action against D2. The plaintiff relied upon the provisions of the Consumer Protection Act 1999 ('CPA') to obtain the reliefs sought.

Held (dismissing plaintiff's claim against D1; allowing plaintiff's claim against D2):

(1) As the HPA was not a cloak for a loan transaction but was in fact a hire-purchase transaction between the plaintiff and D2, the plaintiff was incorrect in making D1 a party to the proceedings herein. (paras 38 & 40)

(2) Despite the transaction being a hire-purchase agreement, the plaintiff was entitled to maintain this action against D2 in view of the provisions of the CPA. Under s. 47, the protection afforded by that Act applied to goods under hire-purchase and in assessing damages for breach of guarantee under the CPA, it could be assumed that the consumer would have completed the purchase of the goods if the guarantee had been complied with. D2 fell within the definition of 'supplier' under s. 3 of the CPA, and, as it had committed a breach of the implied term of 'acceptable quality' of the car under s. 32, the plaintiff was entitled to reject and return the car and obtain the return of all sums paid under the HPA. (paras 47, 51, 52, 60, 61 & 62)

(3) The fact that the plaintiff continued to pay instalments under the HPA did not cause him to lose his right to reject the car or to preclude him from bringing the contract to an end. The plaintiff had proved, on a balance of probabilities, that the car was defective when it was delivered to him as well as his claim for RM30,300 for car rentals. (paras 55, 57 & 59)

Case(s) referred to:

Ahmad Ismail v. Malaya Motor Co & Anor [1973] 1 LNS 1 FC ***(refd)***

AmBank (M) Bhd v. Jonathan Ramesh Kullan & Anor [2013] 1 LNS 306 CA ***(refd)***

Australian Knitting Mills v. Grant [1936] AC 85 ***(refd)***

BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors & Another Appeal [2000] 2 CLJ 197 CA ***(refd)***

Fiman Plastics Industries Sdn Bhd v. Zaitun Industries Sdn Bhd [2003] 1 LNS 246 HC ***(refd)***

Hong Leong Leasing Sdn Bhd v. Tan Kim Cheong [1993] 1 LNS 110 HC ***(refd)***

Kendall & Sons v. Lillico & Sons Ltd [1969] 2 AC 31 ***(refd)***

MBf Finance Bhd v. Low Ping Ming [2005] 1 CLJ 305 CA ***(refd)***

North Central Wagon Finance Co Ltd v. Braisford & Anor [1962] 1 All ER 502 ***(refd)***

Perfect Kam Hung Sdn Bhd v. Cheah Tai Hoe & Anor [2011] 1 LNS 1580 HC ***(refd)***

Puncak Niaga (M) Sdn Bhd v. NZ Wheels Sdn Bhd [2011] 9 CLJ 833 CA ***(refd)***
Rogers & Anor v. Parish (Scarborough) Ltd [1987] QB 933 ***(refd)***

Legislation referred to:
Consumer Protection Act 1999, ss. 2, 3, 5(b), 31, 32, 33, 34, 35, 36, 47
Hire Purchase Act 1967, s. 7(2)
Sale of Goods Act 1957, ss. 4, 16(1)

Supply of Goods (Implied Terms) Act 1973 [UK], s. 14(6)

Other source(s) referred to:
Professor RM Goode, *Hire Purchase Law & Practice*, 2nd edn, pp 81-88

For the plaintiff - Mathialagan (Lizawati with him); M/s Madhi, Param & Co
For the 1st defendant - Jasmeetpal; M/s Siew & Jasmeet
For the 2nd defendant - Jagjit Singh; M/s Rastam Singa & Co

Reported by Ashok Kumar

JUDGMENT

Ahmad Nasfy Yasin JC:

Introduction

[1] This is a classic case where, instead of bringing joy and pride, the new vehicle brought in misery and many sleepless nights much like the reverse of what was said by Khalil Gibran that "your joy is your sorrow unmasked". In this case, as the facts unfold, the plaintiff's anticipated joy of acquiring a new vehicle was short-lived. The happiness that was sought never came and instead of unlocking the key to the happiness the plaintiff unmasked problem and found sorrow the very day he collected the car. Unhappy with his newly acquired happiness which turned to nightmare the plaintiff launched the action herein. He sought redress from this court for the return of the purchase price of new Toyota Camry 2.0G car amounting to RM151,706.45 and damages suffered by him as a result of the breach of implied guarantee as to acceptable quality and fitness for the purpose on the part of the defendants.

[2] The trial commenced and the witnesses who testified for the plaintiff were as follows:

Witnesses	Witness Statement	Enclosure
Ong Siew Hwa	SP1	P1
Tan Siaw Wei	SP2	P35
Awtar Singh a/l Mukha Singh	SP3	P36

The witness who gave evidence for the first defendant is as follows:

Witnesses	Witness Statement	Enclosure
Darshan Singh a/l Mulkh Raj	SD1	D39

And the witness who testified for second defendant is as follows:

Witnesses	Witness Statement	Enclosure
Mohd Rafikin bin Mat Rawi	SD2	D37

The Plaintiff's Case

[3] The plaintiff's narrative of the facts is fairly straightforward. He said he wanted to buy a car of Toyota made, more specifically a Camry. So he approached the first defendant being the supplier, importer, distributor and manufacturer of Toyota vehicle in Malaysia. He then identified the colour the model and all the requisite specifications. He was told that a financing can be arranged by the first defendant with the second defendant being an associate company having same registered address with the first defendant and provides credit facility to the purchasers of vehicles supplied by the first defendant.

[4] The first defendant with the consent of the plaintiff arranged for a credit facilities from the second defendant which, as stated earlier, is an associated company under UMW group for a sum of RM80,000. The plaintiff then entered into hire purchase agreement with the second defendant on 22 March 2010 (exh. P5).

[5] The plaintiff paid a sum of RM71,706.45 to the first defendant (exh. P2 and P4).

[6] On 19 March 2010 the first defendant issued vehicle invoice no: 028Y004207 for the sale of a new Toyota Camry 2.0G bearing car registration No. AHC 9928 for the purchase price of RM151,706.45 to the plaintiff (exh. P3).

[7] The first defendant delivered the said car to the plaintiff on 22 March 2010 at 6.05pm (exh. P6). From then on misery sets upon the plaintiff, so the plaintiff claims.

[8] On the day that he collected the car, the plaintiff complained to the first defendant's representative, Mr Micheal Ong Heng Lee that the car was wobbling and the steering was pulling to the left side.

[9] The first defendant's representative, Micheal Ong Heng Lee told the plaintiff to use the car for the first 100km and later to bring it to the service centre in Taiping.

[10] On 14 April 2010 the plaintiff brought the said car to the service centre in Taiping. The first defendant checked the car and told the plaintiff that the wheel alignment and wheel balancing were out of specification. Alignment and balancing of the wheels were then carried out. However when the plaintiff drove the vehicle, he experienced the same problem. He complained again to Micheal Ong Heng Lee. Mr Micheal Ong Heng Lee told the plaintiff to continue using the car for few days.

[11] On 7 May 2010 the plaintiff complained again to Micheal Ong Heng Lee. The plaintiff again told to bring the said car to the service centre in Taiping. On 8 May 2010 the plaintiff brought the car to the service centre in Taiping. After checking, Micheal Ong Heng Lee told the plaintiff to use the car for 5,000km.

[12] On 30 May 2010 when problem became worse the plaintiff brought the car and left it in the first defendant's premises for the first defendant to rectify the persistent problem of balance of the car. Then on 1 June 2010 the plaintiff was called by the first defendant and the first defendant's technical consultants told that the vehicle has some problem and said the absorbers are hard and has to be changed to the soft type.

[13] The plaintiff then lodged a police report on 8 June 2010.

[14] The plaintiff subsequently met with his friend Mr Awtar Singh, a practising lawyer, and informed him about his car problems and Mr Awtar Singh helped him to arrange for the car to be sent to Toyota Service centre in Ipoh.

[15] On 1 July 2010, after one month, the plaintiff took the car from the Taiping service centre and on 2 July 2010 together with Mr Awtar Singh he took the car to Ipoh service centre. On the same day four technical consultants test drove the said car and agreed that the car experienced some technical problems and told the plaintiff to leave the car there to enable the centre to diagnose the problems. On 6 July 2011 plaintiff left the car in Ipoh service centre.

[16] On 19 July 2010 the plaintiff was contacted by the personnel at the Ipoh service centre to collect his car. He went to the centre and was told by DW2 Darshan Singh - the customer operation manager that the four absorbers and two tyres were changed. The plaintiff then drove the car with Darshan Singh but experienced the same problems. However Darshan Singh told the plaintiff to take back the car and come back if the problem escalates.

[17] On 11 August 2010 since the problems were not solved the plaintiff took the car back to Toyota service centre in Ipoh. The first defendant then changed two more front tyres of the said car.

[18] The plaintiff says the problem persisted. So on 8 December 2010 the plaintiff left the said car in Ipoh service centre. Darshan Singh however contacted the plaintiff to take back the car because of Christmas and year-end holidays but the plaintiff refused unless it is repaired, thereby rejecting the said car.

[19] The plaintiff contends that the goods are not of acceptable quality and not fit for its purpose and the car has defects.

[20] Wherefore, the plaintiff is claiming against the defendants for:

(i) An order for the termination of the contract of sale of the said car;

(ii) Return of the sum of RM151,706.45 being the purchase price of the said car;

(iii) Special damages in the sum of RM30,300 being the amount for car rentals; and

(iv) Interest and costs.

A **The First Defendant's Case**

[21] The first defendant's position is also rather straightforward. The first defendant did not dispute that the plaintiff purchased the said Camry car from the first defendant (exhs. P2, P3, P4 and
B P6). However, the first defendant contended that the said vehicle is a subject matter of a hire purchase agreement between the second defendant and the plaintiff (exh. P5). The registration card of the said car marked as exh. P7 still bears the endorsement of "Hakmilik Dituntut" in favour of the second defendant. Therefore
C the hire purchase agreement is still in force.

[22] The first defendant then asserts that given the existence of the hire purchase agreement between the second defendant and the plaintiff involving the said car, in law, there is no contract of sale of the said car from the first defendant to the plaintiff. From
D the moment the hire purchase agreement came into effect, there had faded out of the picture and ceased to be any contractual relationship between the plaintiff and the first defendant.

The Second Defendant's Case

E

[23] The second defendant asserts that under the hire purchase agreement dated 22 March 2010 ('HPA') the second defendant granted a hire purchase facility to the plaintiff for a Toyota Camry 2.0G (A), Engine No. 1A2E163819, Chassis No:
F MR053BK4107055052, Registration No. AHC 9928 ('the vehicle').

[24] By signing HPA, the plaintiff had agreed to all the clauses as stated in the HPA. There are no allegations of mistake, misrepresentation etc before signing the HPA. At all material time
G the plaintiff had paid all the instalments payment as per agreement on time and proceeded and affirmed the HPA with the second defendant.

[25] In this case, the plaintiff is claiming for the alleged sum that
H he paid to the first defendant and further claim from first defendant for all other losses incurred by him. In no circumstances did SP1 state that he is claiming the money paid and losses suffered from second defendant.

I **[26]** The second defendant further stated that the contents of the plaintiff's amended statement of claim is clear that there is no reasonable cause of action pleaded against the second defendant.

In short, the plaintiff had failed to prove that the second defendant had knowledge of the entire allegation as stated in paras. 7(i) till 7(xvii) and para. 8 in the plaintiff's amended statement of claim.

Issues For Determination

[27] The following issues were framed by the parties to be determined by this court:

(i) Whether the new Toyota Camry 2.0G bearing registration No. AHC 9928 sold by the first defendant to the plaintiff had problem;

(ii) Whether the said Toyota Camry 2.0G No. AHC 9928 of merchantable quality and fit for purpose;

(iii) Whether the plaintiff suffered losses; and

(iv) Whether there was a privity of contract between the plaintiff and defendants.

[28] As I have said earlier the issues above were framed by the parties and the submissions are canvassed along the said issues. However, when the dust of the submissions have settled, the real issue in contention, to my mind, as seen below, would appear to be different.

Finding Of Court

[29] In coming to a decision in this case, this court has carefully considered the oral as well as documentary evidence adduced by all the witnesses, both for the plaintiff as well as the defendants.

[30] With the greatest of respect to learned counsel of the plaintiff and counsel for the first defendant, whose submissions I have anxiously considered, the real issue is nature of the transaction as between the plaintiff *vis-à-vis* the defendants and the laws applicable to govern the transaction.

[31] As stated above the first defendant whilst in one breadth contending that there was a sale transaction between the plaintiff and the first defendant, on the other contended that the sale transaction "had faded out of the picture" with the existence of the HPA. It would accordingly follow also that the contractual relationship between the plaintiff and the first defendant would have "faded out".

[32] Hard as I tried, I am unable to understand this "fading out" argument. As I recall the word "faded out" came from the decision of the Federal Court in the case of *Ahmad Ismail v. Malaya Motor Co & Anor* [1973] 1 LNS 1; [1973] 2 MLJ 66 where Sufian FJ (as His Lordship then was) stated as follows:

> The questions to be determined in this appeal are as follows. After the execution of the hire-purchase agreement between the plaintiff and the finance company did there remain any contractual relationship between the plaintiff and the car dealer so that the plaintiff has a claim against him? As between the plaintiff and the finance company, did the seizure by the police of the car in the particular circumstances of this case constitute a breach of the implied condition under s. 6(1)(b) by the finance company so as to entitle the plaintiff to rescind the hire-purchase agreement and claim damages for that breach?
>
> The first ground of appeal concerns only the first defendant. It is said that the learned appellate Judge was wrong in holding that there remained no contractual relationship between the plaintiff and the first defendant. It is said that despite the existence of the hire-purchase agreement there still remained a contractual relationship between the two of them and that the learned appellate Judge should have held that the first defendant had only assigned his rights in the car to the finance company.
>
> We regard we cannot accept this argument. It is true that by Exhs. P1 and P2 there was a sale by the car dealer of the car to the plaintiff on certain conditions. But ultimately these documents were superseded by the hire purchase agreement Exh. P3 and from the language of this document it is plain that the car dealer completely faded out of the picture and the only contract that remained then was between the plaintiff and the finance company, and accordingly the plaintiff has no claim against the car dealer.

[33] A transaction as in the present case can either be sale or hire purchase transaction. As I understand it from the plaintiff's argument, the crux of the plaintiff's case is that the transaction between the plaintiff and the first defendant is a sale transaction. In fact the plaintiffs stand is supported by the evidence of the first defendant's own witness who candidly admitted that there is a sale transaction between the plaintiff and the first defendant.

[34] Put it differently, what the plaintiff is saying is that despite the existence of the HPA the nature of the transaction is in fact a sale transaction. What remains unsaid was that the HPA is a sham or is a cloak for a loan transaction or that the HPA is in fact should be found to be a bill of sale.

[35] Such an argument is not new. It has been raised in many cases including in the case of *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors & Another Appeal* [2000] 2 CLJ 197. In view thereof, it is incumbent upon me now to examine the true nature of the transaction in accordance with the guidelines laid down by Cairns J in the case of *North Central Wagon Finance Co Ltd v. Braisford & Anor* [1962] 1 All ER 502 stated the following:

> I propose now to consider whether the hire-purchase agreement was in law and in fact a bill of sale. There are relevant authorities, and from them I think that the following proposition can be derived: (i) if a person deliberately, with a clear understanding of what he is doing, and with all appropriate formalities, sells his property to a finance company and then hires it back under a hire-purchase agreement, the agreement is not a bill of sale (*Yorkshire Railway Wagon Co v. Maclure* (1882) 21 Ch D 309), a decision of the Court of Appeal; - and *British Railway Traffic & Electric Co v. Kahn* [1921] WN 52, a decision of Rowlatt J; (ii) if the purpose of the transaction is to enable the hirer to dispose of the property to a customer, the courts will the more readily hold that the agreement is not a bill of sale (*Staffs Motor Guarantee Ltd v. British Wagon Co Ltd* [1934] 2 KB 305, a decision of MacKinnon J); (iii) if the hire-purchase agreement is a mere device to cloak a loan, the document is a bill of sale (*Maclure*'s case, per Lindley LJ); (iv) in considering whether the real transaction is one of loan, it is necessary to look behind the documents to discover its true nature (*Polsky v. S & A Services, S & A Services v. Polsky* [1951] 1 All ER 185, a judgment of Lord Goddard CJ affirmed by the Court of Appeal; (v) if the facts are not truly stated in the documents, there is a circumstance tending to show that the documents are a mere cloak: *Polsky*'s case [1951] 1 All ER 185, 189.

[36] The approach by the above stated case was followed by the Malaysian Court of Appeal in the case of *MBf Finance Bhd v. Low Ping Ming* [2005] 1 CLJ 305 wherein Augustine Paul JCA (as His Lordship then was) speaking for the Court of Appeal had stated as follows:

> A genuine hire purchase agreement will not be termed as a bill of sale. In *McEntire v. Crossley Bros Ltd* [1951] 1 All ER 185 the House of Lords observed that hire purchase agreements are generally not considered bills of sale unless there is a sham. The guidelines for determining whether a hire purchase agreement is a bill of sale and therefore void for non-registration were summarised in clear terms in *North Central Wagon Co Ltd v. Brailsford & Anor* [1962] 1 All ER 502. They are as follows:

A (a) if a person deliberately, with a clear understanding of what he is doing, and with all appropriate formalities, sells his property to a finance company and then hires it back under a hire purchase agreement, the agreement is not a bill of sale (see *Yorkshire Railway Wagon Co v. Maclure* [1882] 21 Ch D 309; *British Railway Traffic & Electric Co v. Kahn* [1921] WN 52);

B

(b) if the purpose of the transaction is to enable the hirer to dispose of the property to a customer, the courts will the more readily hold that the agreement is not a bill of sale (see *Staffs Motor Guarantee Ltd v. British Wagon Co Ltd* [1934] 2 KB 305);

C

(c) if the hire purchase agreement is a mere device to cloak a loan, the document is a bill of sale (see *Yorkshire Railway Wagon Co v. Maclure* [1882] 21 Ch D 309);

D

(d) in considering whether the real transaction is one of loan, it is necessary to look behind the documents to discover its true nature (see *Polsky v. S & A Services* [1951] 1 All ER 185);

E (e) if the facts are not truly stated in the documents there is a circumstance tending to show that the documents are a mere cloak (see *Polsky v. S & A Services* [1951] 1 All ER 185).

[37] The Court of Appeal further stated that in determining the nature of the agreement, whether a hire purchase is a mere cloak for a loan, it is permissible to look behind the document to elicit the true nature of the document. See also the leading text on the subject by Professor RM Goode, *Hire Purchase Law & Practice*, 2nd edn, pp. 81-88.

F

G **[38]** I have carefully considered the facts and it is pertinent at this stage to recall that the plaintiff had made a substantial payment of RM71,706.45 to the first defendant when the invoice was issued by the first defendant. It is imperative also to note that this invoice was issued on 19 February 2010, a date prior to the H HPA which was 22 March 2010. The invoice dated 19 March 2010 (exh. P3) was issued by the first defendant to the plaintiff which clearly states that the seller is the first defendant, the buyer is the plaintiff and financier is the second defendant. The receipts (exhs. P2 and P4) issued by the first defendant totalling a sum of I RM71,706.45 clearly show that the plaintiff paid nearly half of the purchase price to the first defendant before the invoice and the delivery of the car. It is also not in dispute that it was the first

defendant that had arranged for the hire purchase to complete the purchase of the car. However, these facts taken as a whole and given the close association between the first and the second defendant, I am not persuaded to come to the conclusion that first and the second defendant were acting hand in gloves in the entire transaction. It is my respectful view and it is my finding that in fact the HPA is not a cloak for a loan transaction. Thus, it is in fact a hire purchase transaction.

[39] Lest I be accused of oversight, that conclusion is arrived at having taking into account also the fact that the first defendant had all this while consciously taken steps to rectify the mechanical problems of the car. This fact *per se* does not lend any credence to the argument that the transaction herein is a sale transaction between the plaintiff and the first defendant. I am aware of the evidence given by SD1 Encik Rafikin bin Mat Rawi, wherein he admitted that the first defendant is the seller, the second defendant was the financier and the plaintiff is the buyer. However this admission is not conclusive as it is a duty of this court and certainly not that witness to determine the actual nature of the transaction between the parties.

[40] As I have determined that the transaction herein is a hire purchase transaction the plaintiff is accordingly incorrect in making the first defendant as a party to the proceeding herein.

[41] The question that requires answering is whether as between the plaintiff and the second defendant, the plaintiff is entitled to claim for protection accorded by the Sale of Goods Act 1957 especially the under s. 16(1) that is to say the implied condition as to the goods must be of "merchantable quality" since there is no sale transaction.

[42] It is to be noted that the Sale of Goods Act 1957 which an exact replica of the English Sale of Goods Act 1893 contained no definition of the phrase "merchantable quality". Decided cases have shown that there are two approaches or tests to determine whether particular goods are of merchantable quality or otherwise. The 'acceptability test' was derived from the statement of Dixon J in *Australian Knitting Mills v. Grant* [1936] AC 85 and the 'usability test' was set out by Lord Reid in *Kendall & Sons v. Lillico & Sons Ltd* [1969] 2 AC 31.

[43] The plaintiff stated that on 22 March 2010, the day when the car was delivered to the plaintiff, the plaintiff complained of wobbling and the steering pulling to the left side to the salesman Micheal Ong Heng Lee. Within the period of eight and half month the problems are still persisting and the plaintiff took the car for repairs at least nine times. In response to the complaints thereto the first defendant undertook the following:

(i) Wheel alignment;

(ii) Wheel balancing;

(iii) Changed four absorber;

(iv) Changed four tyres;

but the problems refused to go away and remained. SD2 in his evidence candidly admitted that for a new car, the car will not be considered of acceptable quality and fit for purpose if despite wheel alignment and wheel balancing and replacement of shock absorbers and four tyres, the car still faces drivability issues such as pulling to the one side when driving.

[44] Mr Awtar Singh ('SP3') a practising lawyer gave evidence as an independent witness that he himself drove the car and found that the car had problems of wobbling and pulling to one side. He stated that thereafter he arranged for the appointment to bring the car to Toyota service centre in Ipoh. One of the technical consultants of the first defendant told him that the said car did have problems and they needed time to ascertain the cause of the problems. Whilst I am conscious that SP3 is neither an expert witness nor a specialist I accepted SP3's evidence as to what had transpired. I also accept his evidence with regards to what was told to him by the technical consultant, not as to the correctness or truth of the statement but only as regards that the statements were made to him by the consultant.

[45] In this regard, the first defendant also admitted in exhs. P11 and P33 as follows:

Exhibit P11

The first defendant admitted that on 14 April 2010 and 8 May 2010, the first defendant inspected and found that the wheel alignment of the vehicle was out of specification.

Exhibit P33

The first defendant admitted that on 2 July 2010 (after 3 1/2 months) after test driving the said vehicle by four technical consultants, it was found that the vehicle is experiencing some bumpiness and further diagnosis is required to ascertain the actual cause of this condition.

[46] As I have stated above the transaction between the plaintiff and the second defendant is one of hire purchase transaction. That being the case the protection of implied term of "merchantable quality" under the Sale of Goods Act 1957 has no application as the act applies only for sale transaction - see s. 4 of the Act.

[47] However despite the transaction being a hire purchase transaction the plaintiff is not devoid of a remedy. It is my considered judgment that the plaintiff is entitled to maintain this action against the second defendant in view of the provisions of the Consumer Protection Act 1999. It is to be noted that by virtue of s. 2, the Consumer Protection Act 1999 applies "of all goods and services that are offered or supplied to one or more consumers in trade". Consumer in turn is defined as:

"consumer" means a person who:

(a) acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption; and

(b) does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the purpose of:

(i) resupplying them in trade;

(ii) consuming them in the course of a manufacturing process; or

(iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land;

[48] Thus there is no doubt that a person such as the plaintiff who acquires the car for his personal use is a consumer under the Act. Part V of the Act contained important provisions pertaining to implied guarantees in respect of the supply of goods, as follows:

(a) Implied guarantee as to title – s. 31;

(b) Implied guarantee as to acceptable quality – s. 32;

(c) Implied guarantee as to fitness for particular purpose – s. 33;

(d) Implied guarantee as to description – s. 34;

(e) Implied guarantee as sample – s. 35;

(f) Implied guarantee as to price – s. 36.

[49] It is also pertinent to note that s. 5 clearly states that the protection afforded by the act is not complimentary and can be used side by side by any other law for the time being in force. Thus, in respect of sale for example a buyer can avail itself of the protection afforded by the Sale of Goods Act 1957 as well as the Consumer Protection Act 1999 – see s. 5(b) of the Consumer Protection Act 1999.

[50] In the present context and as I have stated above the plaintiff's reliance on the Consumer Protection Act 1999, is well founded because Part VI and VII respectively of the Act contained clear provision allowing the plaintiff to have redress against the "supplier" who had supplied the goods. Section 3 of the Act, which contained the definition of terms, defines "supplier" as follows:

> "supplier" means a person who, in trade:
>
> (a) supplies goods to a consumer by transferring the ownership or the possession of the goods under a contract of sale, exchange, lease, hire or hire-purchase to which that person is a party; or
>
> (b) ...

[51] It is clear therefore, based on the definition, in the present case the second defendant is clearly a "supplier" within the meaning of the Act.

[52] Based on the facts alluded to above, I am of the considered view that there has been a breach of the implied term of acceptable quality on the part of the second defendant which is defined in s. 32 of the Consumer Protection Act 1999 as follows:

> (1) Where goods are supplied to a consumer there shall be implied a guarantee that the goods are of acceptable quality.

(2) For the purposes of subsection (1), goods shall be deemed to be of acceptable quality - A

(a) if they are -

(i) fit for all the purposes for which goods of the type in question are commonly supplied; B

(ii) acceptable in appearance and finish;

(iii) free from minor defects;

(iv) safe; and C

(v) durable; and

(b) a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard the goods as acceptable having regard to - D

(i) the nature of the goods;

(ii) the price;

(iii) any statements made about the goods on any packaging or label on the goods; E

(iv) any representation made about the goods by the supplier or the manufacturer; and

(v) all other relevant circumstances of the supply of the goods F

[53] I pause here to observe that section the Consumer Protection Act 1999 has contained a clear and deliberate act of the part of the legislature, whereby in contradistinction with the Sale of Goods Act 1957 the implied term as regard to "quality" G differs in that the Consumer Protection Act 1999 employs the word "acceptable" whereas the Sale of Goods Act 1957 uses the word "merchantable". I could perhaps say that this deliberate act constitutes an attempt to break away from the controversies obtainable at common law whereby the term "merchantable" is H difficult to define and has given rise to at least two tests, as stated above, and thereafter led to the enactment of a statutory definition contained in s. 14(6) of the Supply of Goods (Implied Terms) Act 1973 following a recommendation by the Law Commission. That definition of course did not last long as the Law Commission later I suggested that the term merchantable quality be replaced

"acceptable quality". However the Sale and Supply of Goods Act 1994 UK instead of using the term "acceptable quality" now uses the word "satisfactory quality". It will be of interest to note also that the New Zealand and Australian jurisdictions have adopted the term acceptable quality in the respective legislations; see the New Zealand Consumer Guarantees Act 1993 and the Australian Competition and Consumer Act 2010.

[54] I must also note that s. 7(2) of the Hire Purchase Act 1967 clearly stated that there shall be an implied term in every hire purchase agreement that the goods hired shall be of "merchantable quality".

[55] Having examined carefully the documentary evidence and the oral evidence of witnesses it is my finding that the plaintiff has proved on the balance of probabilities that the car was defective when it was delivered to the plaintiff. This is a case where the mechanical faults were discovered after the car was put to use. It is to be recalled that the plaintiff had complained of drivability of the car from onset, the moment after accepting delivery of the car. Further the first defendant by its own admissions had admitted the car's drivability is far from satisfactory. Hence the plaintiff being the consumer naturally had the reasonable expectation that the car would be free from defects and would run smoothly.

[56] In summary, taking into account the parameters set in s. 32 in determining the acceptable quality, I hold that the car supplied to the plaintiff is not of acceptable quality. Support for this view can also be gleaned from the cases of *Puncak Niaga (M) Sdn Bhd v. NZ Wheels Sdn Bhd* [2011] 9 CLJ 833; *Perfect Kam Hung Sdn Bhd v. Cheah Tai Hoe & Anor* [2011] 1 LNS 1580; [2011] 9 MLJ 593; *Fiman Plastics Industries Sdn Bhd v. Zaitun Industries Sdn Bhd* [2003] 1 LNS 246; [2003] 4 MLJ 258; *Rogers & Anor v. Parish (Scarborough) Ltd* [1987] QB 933.

[57] As regards to the argument of the second defendant that the plaintiff had lost the right to reject the car when the plaintiff had continued to make the payment of instalments, I can do no better than to refer to the judgment of His Lordship Visu Sinnadurai in *Hong Leong Leasing Sdn Bhd v. Tan Kim Cheong* [1993] 1 LNS 110; [1994] 1 MLJ 177 (which was quoted with approval in the recent Court of Appeal's decision in *AmBank (M) Bhd v. Jonathan*

Ramesh Kullan & Anor [2013] 1 LNS 306; Civil Appeal No. W-04-144-04/2012 dated 27 February 2013) wherein the relevant parts are as follows:

> One further point I need to consider is whether the defendant, by paying the instalments had accepted the breach of the contract by the plaintiff. Can it be said that when the defendant continued paying the instalments when he was aware that the machines had not been supplied, he had accepted the breach and instead of avoiding the contract, had affirmed it. In this respect, *Yeoman Credit Ltd v. Apps* is clearly distinguishable. In that case, the Court of Appeal held that there was no total failure of consideration as the hirer had been delivered the car, *albeit*, defective. As this point was not canvassed by the plaintiff, I need not delve into it, except to say that, whilst the defendant may have intended to maintain the contract by paying the instalments (if he did) in anticipation that the machines would be delivered to him, the payment of these instalments cannot preclude him from thereafter bringing the contract to an end. As Goff and Jones, *The Law of Restitution* (2nd Edn) point out at p. 464:
>
> > While he paid the instalments, the defendant had shown an intention to maintain the contract; but, in view of the continuing nature of the breach, his payments did not preclude him from therefore bring the contract to an end.
> >
> > In any case, it is doubtful whether such principles are at all applicable to cases such as the present one where there is a total failure of consideration. The question of acceptance of the contract only arises in cases where a party seeks to recover money in pursuance of a contract under which he becomes entitled to rescind it on the ground of total failure of consideration. In other words, it is the hirer (the defendant), who has the right to recover the money paid as instalments and not the plaintiff, who has the right to affirm or rescind the contract: see *Halsbury's Laws of England* (4th Edn) at para 667.

[58] In my judgment *albeit* the plaintiff being the delivered the car, the facts showed that the car is defective from the start and that being the case the plaintiff is therefore entitled to return the said car to the first defendant. The plaintiff testified that within a period of nine months he took the car to first defendants workshop nine times. He left the car from 8 December 2010 in

first defendants workshop. The defendants gave courtesy car on two occasions and later declined to give any car while his car in the workshop. As a result he had to rent a car from Poly-Travels Sdn Bhd for the following periods:

(i) 2 June 2010 - 30 June 2010 - 29 x RM150 = RM4,350 (P27)

(ii) 8 December 2010 - 31 December 2010 - 24 x RM150 = RM3,600 (P28)

(iii) 1 January 2011 - 31 January 2011 - 31 x RM150 = RM4,650 (P29)

(iv) 1 February 2011 - 28 February 2011 - 28 x Chinese new year = RM5,000 (P30)

(v) 1 March 2011 - 31 March 2011 - 31 x RM150 = RM4,650

(vi) 1 April 2011 - 30 April 2011 - 30 x RM150 = RM4,500

(vii) 1 May 2011 - 23 May 2011 - 23 x RM160 = RM3,550

196ys = RM30,300

[59] The plaintiff's evidence was corroborated by the clerk (SP2) who issued the receipts for the payments made by the plaintiff to Poly-Travels Sdn Bhd. She explained the charged for the rental and stated that the total amount paid by the plaintiff for seven month was RM30,300. Thus I have no hesitation in accepting her evidence as truth and the plaintiff has proven on a balance of probability that he has suffered a loss of RM30,300 in renting a car.

[60] I must also add for completeness, that the fact that the car is on hire purchase would not disentitle the plaintiff from bringing this action against the second defendant. Support for this view can be obtained from s. 47 of the Consumer Protection Act 1999 which reads as follows:

> Section 47. Assessment of damages in case of hire-purchase agreements
>
> The damages that a consumer may recover for a failure of goods supplied under a hire-purchase agreement to comply with a guarantee under this Act shall be assessed, in the absence of evidence to the contrary, on the basis that the

consumer will complete the purchase of the goods or would have completed the purchase if the goods had complied with the guarantee.

[61] Two important conclusions, in my view can be drawn from the said provision namely:

(a) that the protection afforded by the Consumer Protection Act 1999 applies to goods under hire purchase; and

(b) that in assessing damages as a result of breach of the guarantee under the act, an assumption can be made that the consumer will complete the purchase of the goods.

Conclusion

[62] Having stated the above, I am of the view that where a vehicle which was the subject matter of hire purchase agreement has been declared to be of unacceptable quality the plaintiff is entitled to reject and return the goods which the plaintiff in my judgment has properly done in accordance with the provisions of the Consumer Protection Act 1999. The plaintiff is therefore entitled to the return of all sums paid to the second defendant and damages of RM30,300.

[63] In the premises the plaintiff's claim against the first defendant is dismissed with costs whilst the plaintiff's claim against the second defendant is allowed in terms as stated above with costs to be taxed. I hereby order so.